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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 733

JOSEPH FRIEDMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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26 U. S. C. A., Sec. 145 (b), 53 Stat. 62 2

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PETITION FOR WRIT OF CERTIORARI.

Joseph Friedman, petitioner, hereinafter called the defendant, prays that a writ of certiorari be issued to review the judgment entered October 6, 1941, in the United States Circuit Court of Appeals for the Third Circuit. (R. 630)

Judgment Below.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Jurisdiction.

The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925, (43 Stat. 938, 28 U. S. C. A. Sec. 347) and under Rule 38 of the Revised Rules of the Supreme Court of the United States. The opinion of the Circuit Court of Appeals for the Third Circuit was filed October 6, 1941, and this Petition was filed November 8, 1941. The opinion of the Circuit Court of Appeals for the Third Circuit is included in the record certified to this Court. (R. 629)

Statement of Case.

In stating the case, counsel have had difficulty in avoiding argument, due to the fact that the points relied upon are of such nature that it is necessary to point out certain deficiencies in the record in order to make defendant's position clear to the court.

The defendant was indicted for willful evasion of his individual income tax, in violation of 26 U. S. C. A. Sec. 145(b), 53 Stat. 62, which provides:

> Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect, or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

The indictment was in three counts, the first charged willful evasion for the year 1935, the second for 1936 and the

third for 1937. (R. 9-17) Defendant was convicted on all counts, (R. 626), and was sentenced to imprisonment for ten years and to pay a fine of $20,000 and the costs of prosecution. (R. 627-8)

It is admitted by the defendant that the record shows that the defendant was engaged in two gaming enterprises in 1935, 1936 and 1937, namely, that of "numbers" and that of "penny hearts", crimes prohibited by the laws of the State of New Jersey. The defendant had two partners in the "numbers" business, Leroy Williams and Herndon Daniels. The defendant received one-half of the proceeds of the partnership, Williams and Daniels received one-fourth each.

The defendant complains.

1. Of the admission in evidence of Government Exhibit 4 (R. 587-591), the "Partnership Return of Income" of "Daniels, Williams & Friedman" for the year 1937, and of the instructions of the court that said "partnership return *was filed by the defendant* and his partners" (R. 555), and that such filing of said return could be considered by the jury "as some evidence that he (the defendant) endeavored to evade his own income tax for the year 1927." (R. 556), because the record fails to show that defendant had any guilty knowledge of, or was a party to, the preparation, the making or the filing of that fraudulent partnership return and because the record fails to show that the defendant aided or abetted, or was accessory before or after the fact to the preparation, making or filing of the fraudulent partnership return by his copartner Leroy Williams;

2. Of the charge to the jury on reasonable doubt (R. 557), because the court then warned the jury: "To justify acquittal it (reasonable doubt) must be substantial in view of all the evidence and not a mere possibility of innocence."; and

3. Of the refusal of the defendant's request to charge that the burden was on the prosecution to prove every material element of the crime charged beyond a reasonable doubt (R. 565, 561). The court charged: (R. 554)

> There are two elements in this crime, this alleged crime, two principal elements at least, and I think you need concern yourself only with those two elements. The first is that the defendant owed a tax. The second that he willfully attempted to evade or defeat that tax. You must first find that he owed a tax, a tax in excess of the tax paid by him, and secondly, you must find that he willfully attempted to evade or defeat the tax before you can find him guilty.
>
> Now, the word "willful" is used in that statute in its ordinary and common meaning. It means exactly the same to you as a member of the jury, as laymen, as it means to me as a judge, but so there will be no mystery about it, I think I had better read you very briefly a very small section of a case in one of the courts of appeals.
>
> Of coarse, the question of willfullness is a question of intent. Did he intend to do willfully what he is charged with doing? And on income tax questions this has been stated, and this is a correct interpretation of the law: "Questions of intent of this character are for the jury, and willful intent in failing to file a return may be supported by the circumstances surrounding this case. Direct proof of willfullness is not necessary to establish guilt in income tax proceedings."
>
> * * * * * * *
>
> (R. 559): In order for an attempt to evade or defeat a tax or the payment thereof to be "willful under the statute, not only must an obligation exist to pay a tax on net income actually received, but there must also be a specific wrongful intent, that is, actual knowledge on the part of the defendant of the existence of such obligation. This is the very essence of the statutory crime charged.

To summarize: The court first charged that there were "two elements" in the crime, "two principal elements *at least*" and later told the jury that the very essence of the crime was "actual knowledge" by the defendant of an obligation to pay the tax and "a wrongful intent" to evade the tax. The court first told the jury that "willful" as used in the statute defining the crime was used in its "ordinary and common" meaning and again that "willful" meant an "actual knowledge".

Questions Presented.

1. A) Is a Partnership Income Return (G-4, R. 587-591) supposedly prepared, made, signed and filed by one copartner admissible against a defendant,

B) Is it evidence of willful evasion of the defendant's individual income tax,

C) Can the trial court say to the jury that "the partnership return was filed by the defendant and his partners"

When:

a) The partnership was engaged in a single illegal enterprise prohibited by a State statute, namely, gaming;

b) The defendant is charged with willful evasion of only his own individual income tax;

c) There is no proof of guilty knowledge by the defendant of the preparation, making, signing or filing of the partnership return by his copartner;

d) There is no evidence that the defendant was an accessory before or after the fact to the preparation, making, signing or filing of the partnership return by his copartner?

2. Is it reversible error for the court to instruct the jury: "To justify an acquittal it (reasonable doubt) must be sub-

stantial in view of all the evidence and not a mere possibility of innocence''?

3. Where the defendant in a criminal trial requests the court to charge the jury that the burden of proving every material element of the crime charged, beyond a reasonable doubt, is upon the prosecution,—is it then sufficient for the court to state to the jury that which the court considers to be the material elements of the crime, yet (a) fail and refuse to tell the jury all of those material elements must be proved beyond a reasonable doubt, and (b) state all of the material elements of the crime in such a manner as to confound and confuse the jury?

Reasons for Granting the Petition.

By its opinion, the United States Circuit Court of Appeals for the Third Circuit has approved the doctrine (1) that a fraudulent Partnership Income Return (G-4, R. 587-591), supposedly prepared, made, signed and filed by one co-partner is admissible against all partners engaged in business with him—business made illegal by a State statute—regardless of whether or not the partner on trial for willful evasion of his *individual income tax* had guilty knowledge of the Partnership Return, or was an accessory before or after the fact to the preparation, making, signing or filing of the Partnership Return by a copartner; (2) that under such circumstances the fraudulent Partnership return is evidence of willful evasion of the defendant's *individual* income tax; and (3) that the court can invade the province of the jury. Therefore, said opinion is in conflict with established law.

Sleight v. *U. S.*, 87 F. 2d 459, 461, 65 App. D. C. 203.

By its opinion, the said United States Circuit Court of Appeals approved an instruction of reasonable doubt which is contrary to the weight of authority.

Paddock v. *U. S.* (C. C. A. 9), 79 F. 2d 872, 876;
Boatright v. *U. S.* (C. C. A. 8), 105 F. 2d 737, 740.

By its opinion the said Circuit Court of Appeals held that misleading and confusing instructions to the jury, which were contrary one to the other, were proper. That is in sharp conflict with this court and with the weight of authority.

Mills v. *U. S.*, 164 U. S. 644, 649, 17 S. Ct. 210, 41 L. Ed. 584;
Dr. J. H. Mc Lean Medicine Co. v. *U. S.* (C. C. A. 8), 253 F. 694, 696, 165 C. C. A. 288;
Nicola v. *U. S.* (C. C. A. 3), 72 F. 2d 780, 787.

By its opinion, said Circuit Court of Appeals held that a jury need not be told that every material element of a crime need not be proved beyond a reasonable doubt, before a defendant in a criminal trial can be convicted. That is counter to established principles of law.

Mc Afee v. *U. S.* 105 F. 2d 21, 31, 70 App. D. C. 142.

By its opinion, the said Circuit Court of Appeals held that a court could tell the jury what the evidence was, thus invading the province of the jury.

Conclusion.

Wherefore, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to The United States Circuit Court of Appeals, for the Third Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all

of the proceedings in case numbered 7744 on its docket "*United States of America* v. *Joseph Friedman*," and that the said judgment of the Circuit Court of Appeals, for the Third Circuit, may be reversed and for such other and further relief as to the court may seem meet and proper.

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